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No. 04-_____

IN THE

# Supreme Court of the United States

JAMES J. HAYES,

*Petitioner,*

VS.

**GENESIS HEALTH VENTURES, INC., et al.,**

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

**PETITION FOR A WRIT OF CERTIOTATI**

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## QUESTION PRESENTED

Can federal courts ignore Fifth Amendment Due Process and Takings issues in dismissing a bankruptcy appeal on the basis of the judicial doctrine of equitable mootness or does the judicial duty to protect and defend the Constitution require federal courts to consider the constitutional issues?

## PARTIES TO THE PROCEEDINGS

The petitioner, James J. Hayes, is a shareholder of Genesis Health Ventures, Inc. during its bankruptcy.

The respondent, Genesis Health Ventures, Inc. is the reorganized Genesis.

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**OCTOBER TERM, 2004**

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# PETITION FOR WRIT OF CERTIORARI

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James J. Hayes, on behalf of himself and the members of Genesis equity class, respectfully petitions for a writ of certiorari to remand this case to the United States Court of Appeals for the Third Circuit for consideration of Fifth Amendment due process and compensation issues, and on the application of the judicial doctrine of equitable mootness.

## OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of a motion to reopen its dismissal of a bankruptcy court appeal on the basis of the judicial doctrine of equitable mootness (App. A1) is unreported. The order of the district court, acting as a court of appeal, denying

petitioner's motion to reopen the appeal following its dismissal for equitable mootness (App. A5) is also unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 6, 2004. (App. A8) A petition for rehearing was denied on January 25, 2005. (App. A10)

Petitioner believes that the jurisdiction of this Court is required by its decision in *Marbury v. Madison,* 5 U.S. (1Cr.) 137, (1803) that requires federal courts to decide constitutional issues. However, because of changes in this Court's rules limiting the circumstances for appellate review; this case is presented as a petition for a writ of certiorari.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in part that "*No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*" In this case, the petitioner argued that:

1) the cancellation of the common stock of Genesis Health Ventures Inc. by the bankruptcy court without providing the shareholders compensation violated the Takings Clause, and

2) the failure of the bankruptcy court and the United States Trustee to appoint an equity committee — with legal and financial advisors to participate with the legal and financial advisors of the senior lenders and unsecured creditors in negotiating the reorganization plan that cancelled shareholders stock—deprived shareholders due process in the taking of their property.

## STATEMENT OF THE CASE

This case is a pro se appeal of the United States Bankruptcy Court District of Delaware's "cram down" confirmation of a reorganization plan in the joint bankruptcy of Genesis Health Ventures Inc. and the Multicare Companies Inc. Genesis shareholders were denied representation in the negotiations among the debtor, senior lenders and unsecured creditors that produced a reorganization plan that cancelled their stock without providing any compensation. Ninety four per cent of the equity in the new Genesis was allocated to the senior lenders of Genesis and Multicare. The District Court denied petitioner's request for a post-confirmation equity committee to argue the appeal. (App. A12)

The confirmation is termed a "cram down" because a 85.9% of the Genesis' unsecured creditor vote, principally the junior bondholders, was against the plan. *In Re Genesis Health Ventures, Inc., et al.*, 266 B.R. 591 598 (Bankr. D. Del.) The petitioner and a junior bondholder appealed the confirmation. Both appeals were dismissed by the District Court based on the judicial doctrine of equitable mootness. Subsequently, a group of about two hundred and fifty junior bondholders brought a fraud on the bankruptcy court suit that alleges that certain members of Genesis senior management and certain senior lenders conspired to under-report earnings. This lowered the investment banking valuations that the bankruptcy court relied on in confirming the reorganization plan.[1]

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[1] See http://www.richardhaskellvsgoldmansachsetal.com
On December 31, 2004, the enterprise value of the reorganized Genesis was about $750 hundred million dollars higher than its bankruptcy valuation. About $200 million corresponds to the market increase of the comparable companies used in the bankruptcy valuation. The $550 million difference is an estimate of the bankruptcy undervaluation and is consistent with the allegations in the bankruptcy fraud suit.

The petitioner's appeal was beset by unusual procedural circumstances that became the only issue in the Third Circuit. After filing a timely notice of appeal, the petitioner requested the bankruptcy court appoint a post-confirmation equity committee to argue the appeal. Then after the District Court issued a briefing schedule, the petitioner filed a motion for an equity committee in the District Court. Genesis opposed both motions. After a significant delay, the District Court denied the motion for an equity committee and rescheduled the opening brief. (App. A12 & A14) The petitioner filed a timely opening brief.

Rather than file a reply, Genesis notified the District Court of another appeal with the same parties that the District Court had dismissed on the day it denied petitioner's motion for an equity committee. It happened that nine weeks after the petitioner's appeal was docketed, the bankruptcy court inexplicably filed a second notice of appeal with the District Court showing the same parties as the earlier docketed appeal. The District Court docketed this as a new appeal and on the same day docketed Genesis' designations of the record. The same judge was assigned as in the petitioner's appeal. This appeal is referred to as the "spurious" appeal. Genesis filed an unopposed motion to dismiss the spurious appeal on the grounds of equitable mootness that was granted by the District Court.

Following letters to the District Court by the parties, the District Court applied the equitable mootness ruling in the spurious appeal to petitioner's appeal. That order also requested that parties disagreeing with the order file a motion to reopen. The petitioner filed a motion to reopen and that motion was denied. The petitioner appealed to the Third Circuit.

### A. The Third Circuit Opinion

The Third Circuit noted that most of the petitioner's arguments on appeal concerned "*the application of the doctrine of equitable mootness in his case.*" (App. A3) Because the petitioner did not appeal the dismissal of the spurious appeal and the motion to reopen was filed more than ten days after the dismissal the Third Circuit concluded that it did not have jurisdiction to review equitable mootness. The Third Circuit review was limited to the District Court's denial of the motion to reopen. Using an abuse of discretion standard and finding none it affirmed. (App. A4)

The Third Circuit's decision relied on the erroneous fact that the petitioner had filed two notices appeals from "*the exact same bankruptcy judgment confirming the exact same reorganization plan*" and that Genesis had not shown bad faith in bringing the problem to the District Court's attention. (App. A4)

### A. The Third Circuit Overlooked Constitutional Issues The Petitioner Raised In The District And Third Circuit Appeals

The Third Circuit opinion noted that most of the Appellant's arguments "*concern the application of the doctrine of equitable mootness.*" (App. A3) Three of the four issues that the petitioner tried to raise in the circuit court appeal, however, concerned the application of the Fifth Amendment to the Genesis bankruptcy proceedings:

2. Do the due process provisions of the Fifth Amendment require the appointment of an equity committee in large company bankruptcy proceedings where shareholders' equity ownership is at stake; or is it sufficient to permit individual

shareholders to object and only be heard at the end of the confirmation hearing?

3. Do the due process provisions of the Fifth Amendment require the district court to hear an appeal from a shareholder whose property, the equity ownership of a bankrupt company, was taken by a reorganization plan confirmed by the bankruptcy court?

4. Does a Chapter 11 bankruptcy reorganization plan that cancels the ownership interests of equity holders without any compensation violate the Takings Clause of the Fifth Amendment?

*Brief For Appellant*, Case 04-1862, Third Circuit, p.1

In the District Court, the petitioner's motion for the appointment of an equity committee argued:

1) [a]ppointment of a committee of equity security holders is required by the due process provisions of the Fifth Amendment. The Supreme Court has held that citizens must be accorded due process when being deprived of their property by the government in furtherance of public policy, here provisions of the Bankruptcy Code. Participation in appellate proceedings challenging the taking of shareholders property is such required due process.

. . .

4) Merging the two companies caused much confusion as to the proper valuation methodology that established the enterprise values which determined the allocations among the senior lenders and unsecured creditors and left shareholders with a zero allocation. There is substantial issue whether

the valuation and allocations should be based on Genesis and Multicare as individually structured or on the reorganized company. The valuation differences amount to hundreds of millions of dollars. In addition, there is evidence that the debtor's counsel made a $200 million dollar error in determining the threshold enterprise value that made the Senior Lenders whole. Taken together, these errors total several hundred millions dollars and raise an issue that even under established bankruptcy priority that shareholders would be entitled to a relatively small but monetarily significant allocation. Without representation of counsel, shareholders could not adequately develop these issues at the August confirmation hearings. Representation by counsel is required to develop these issues on appeal.

*Motion For Appointment Of Official Committee Of Equity Security Holders For The Purpose Of Appealing Confirmation Of The Genesis Reorganization Plan*, C.A. No. 01-718, District Court, District of Delaware, p. 2-3.

After the District Court denied this motion, the petitioner argued in his opening brief that the Bankruptcy Court's:

I. FAILURE TO APPOINT AN EQUITY COMMITTEE VIOLATED SHAREHOLDERS FIFTH AMENDMENT RIGHTS TO DUE PROCESS

The Fifth Amendment provides that citizens may not be deprived of life, liberty, or property without due process of law. Subsequent court decisions have included the right to an impartial hearing, the right to call and cross examine witnesses, and the right to have a lawyer argue

> one's case as fundamental elements of due process. Owners of the common stock of Genesis Health Ventures, Inc. were denied these fundamental protections in the jointly administered bankruptcy proceedings of Genesis and Multicare AMC, Inc. The proceedings facilitated a reorganization of the company's financial obligations that placed the shareholders ownership of Genesis in jeopardy. Bankruptcy proceedings that place ownership at risk entitle owners to the due process protections of the Fifth Amendment.

*Assignments Of Error And Appellant's Brief,* C.A. No. 01-718, District Court, District of Delaware, p. 2.

The petitioner's first argument in the motion to reopen the dismissal of the spurious appeal raised a due process issue.

> It would violate Appellant's due process rights to dismiss the active case 01-718 based on this Court's findings in a spurious case 02-216 when the Appellant had not briefed the spurious case.

*Motion To Reopen,* C.A. No. 01-718, District Court, District of Delaware, p. 6. #19.

## ARGUMENTS FOR REMAND

### A. The Third Circuit's Jurisdiction Requires Consideration Of The Overlooked Constitutional Issues

The shareholder appeal of the Bankruptcy Court's confirmation of the Genesis and Multicare reorganization raised Fifth Amendment takings and due process issues in the District Court and the Third Circuit. Both courts ignored the

constitutional issues in dismissing the shareholder appeal on the basis of the judicial doctrine of equitable mootness. Since *Marbury v. Madison* was decided 1803, this Court has required the federal courts to decide constitutional issues that are raised in cases under its jurisdiction.

Article III Section 2. [1] of the Constitution states that: "*[t]he judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution....*" In 1803 in *Marbury v. Madison* chief justice John Marshall established the foundation of constitutional law.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply.
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution – would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the constitution. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all courts arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at

all, what part of it are they forbidden to read, or do they obey?

*Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177-178 (1803)

Genesis is such a case, and according to Marshall's reasoning the District Court and the Third Circuit – by ignoring constitutional issues presented in the bankruptcy appeal – violated their judicial duty.

And that duty has not changed in 200 years. In 1957, for example, this Court examined the denial of passports to certain groups on the question whether this denial violated the Fifth Amendment rights of liberty to these citizens.

> We deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress... had given the Secretary authority to withhold passports to citizens because of their beliefs or associations.

*Kent v. Dulles*, 357 U.S. 116 130 (1957)

This Court was able to decide the constitutional issues raised by the withholding of passports by the Secretary of State because the circuit court had reviewed and considered the constitutional issues in its opinion. In Genesis, the Third Circuit has ignored the constitutional issues raised in the shareholders appeal. The failure to decide constitutional issues itself denies shareholders their Fifth Amendment due process rights which this Court is obligated to rectify.

The Third Circuit maintains that its jurisdictional mandate is limited to considering the District Court's denial

to reopen "*because the* [petitioner's] *motion to reopen was filed more than ten days after the entry of the March 13, 2003 order, it did not toll the time for appeal from that order.*" (App. A3n2) The Third Circuit is wrong in thinking this procedural peculiarity is of any significance to its duty to decide constitutional issues. The Fifth and Seventh Circuits have both set aside similar jurisdictional issues to consider and decide constitutional issues arising from confirmation of a bankruptcy reorganization plan.

*In re Kendavis Holdings Co.*, 249 F. 3rd 383 (5th Cir. 2001), the Fifth Circuit reviewed and upheld due process claims in a bankruptcy case fifteen years after the bankruptcy court's order confirming the reorganization plan. In this case, a Kendavis employee discovered the deficiencies in his retirement compensation were due to a transfer of $20 million from the company's retirement plan in the bankruptcy reorganization. Twelve years after confirmation, the employee's suit precipitated reopening the bankruptcy. After establishing that the employee knew of the bankruptcy, the court fined the retired employee $40,000 for defying the court's injunction against claims arising before the confirmation. The Fifth Circuit reversed on the basis that the employee had not been provided constitutional due process: "*Under the Supreme Court's standard, we must analyze the particular facts of each case.*" Id. 386

*In Re Kmart Corp.* 359 F. 3d 866 (7th Cir. 2004), the Seventh Circuit considered and denied due process arguments by a non-party appeal of bankruptcy court order. Rather than dismiss the appeal for lack of standing, the Seventh Circuit permitted the non-party to intervene in the circuit court. Id. 870 These recent Fifth and Seventh Circuit cases show that procedural difficulties, even if genuine, cannot eliminate the obligation of federal courts to decide constitutional issues.

Genesis is a typical *Marbury* case where "*the constitution must be looked into by the judges.*" Id. 178. The alleged procedural barrier cited by the Third Circuit is of no merit. This Court is required to remand this case to the Third Circuit for consideration of the Fifth Amendment Takings and Due Process issues.

### B. The Third Circuit's Jurisdiction Requires Consideration On The Constitutional Application Of The Judicial Doctrine Of Equitable Mootness

The judicial doctrine of equitable mootness was crafted by the Third Circuit in the Continental Airlines bankruptcy[2] to foreclose viable appeals in situations where granting relief would require unscrambling a bankruptcy reorganization that was substantially completed before the appeal was taken.

The Third Circuit affirmed the District Court's dismissal of the shareholder appeal on the basis of this doctrine without considering the fundamental question of whether a judicial doctrine could foreclose the Fifth Amendment rights of shareholders to compensation and due process in bankruptcy proceedings that cancelled their stock. Actually, denying shareholders their appeal on the basis of a judicial doctrine is a further violation of shareholders Fifth Amendment Due process rights.

The dissenting opinion in the 7-6 en banc *Continental* decision – while not considering an appellant with constitutionally protected right – had serious doubts about the judicially crafted remedy of equitable mootness. Writing for the dissent, it was Judge Alito's view that:

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[2] *In re Continental Airlines*, 91 F. 3d 553 (3rd Cir. 1996) (en banc.)

> [t]he majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief. According to the majority, there is no clear rule for determining when a bankruptcy appeal is "equitably moot" Instead, this is said to be a discretionary determination to be made in the first instance by the district court based on a weighing of five factors that the majority has culled from the opinions of our "sister circuits." In my view, **if the doctrine has any validity, it is more limited than the majority holds. (emphasis added)**

*In re Continental Airlines*, 91 F. 3d 553 567 (3rd Cir. 1996) (en banc.)

Clearly, the doctrine could not be applied in cases like Genesis where shareholders have asserted that their constitutional rights to compensation and due process have been violated by the bankruptcy court's confirmation of a reorganization plan that extinguished their ownership without compensation. In cases where a citizen's constitutional rights are at stake, however, this Court in *Marbury v. Madison, 5 U.S. (1Cr.) 137 (1803)* requires federal courts to make a constitutional analysis.

> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply. Id. 177.

In the shareholder appeal, the Third Circuit must consider whether its doctrine of equitable mootness overrules the Constitution.

Subsequent to the *Continental* decision, the Third Circuit has allowed bankruptcy appeals to proceed where the relief requested would not require unscrambling of the bankruptcy reorganization. See *In re PWS Holdings Corp.*, 258 F.3d 224 and *In Re Zenith Electronics Corp.*, 329 F. 3d 338. The Petitioner's opening brief argued that investment banker mistakes caused an undervaluation Genesis' enterprise value that combined with debtor's errors in calculation of the hypothetical enterprise value required to satisfy the senior lenders' claims provided distributions to the senior lenders that were substantially greater than their claims. Courts could provide relief by requiring that the senior lenders return their windfall gains to the bankruptcy estate for distribution to lower ranking classes. An unscrambling of the reorganized Genesis would not be required and equitable mootness would not apply.

The Third Circuit avoided reviewing the application of equitable mootness because in its view it lacked jurisdiction on this issue. In reaching this conclusion, the Third Circuit relied on the bizarre set of procedural circumstances discussed below.

### C. The Spurious Appeal And The Procedural Barrier Allegedly Limiting The Review Of Equitable Mootness Issues Crumbles Under The Facts

The Third Circuit's view of its limited jurisdiction rests on its conclusion that the District Court did not abuse its discretion in applying the doctrine of Res Judicata to dismiss the petitioner's appeal. The District Court's decision depended on the spurious appeal being a genuine appeal

which it is not. Genesis misrepresented that two separate notices of appeals were filed with respect to the bankruptcy court's September 20, 2001 order confirming Genesis' reorganization plan where in fact the petitioner filed only one. Genesis' Res Judicata arguments are based on a bogus appeal that they in all likelihood helped to create.

From Genesis' arguments, the Third Circuit concluded as facts that: *"[o]n September 13, 2001, the Bankruptcy Court entered judgment confirming the plan...."* and that "*Hayes filed two notices of appeal from this judgment on September 13, 2001 and September 20, 2001"* (App. A2) The real facts are that the judgment confirming the plan was entered on September 20, 2001 [3] and Hayes filed only one notice of appeal and that was on September 18, 2001.[4] Hayes subsequently amended his premature notice of appeal to reflect the correct date of the bankruptcy court's order.[5] The so called September 13, 2001 notice of appeal, and the foundation of the spurious case 02-00016, would not be

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[3] U.S. Bankruptcy Court District of Delaware Docket Report entry 338582335 on September 20, 2001 states – "*Findings of Facts, Conclusions of Law and Order Confirming Debtors' Joint Plan of Reorganization Signed by Judge Wizmur on 9/20/01.*"

The September 13, 2001, date reflects the bankruptcy court's opinion that held the plan was confirmable subject to certain modifications. Genesis subsequently modified the plan and the bankruptcy court then confirmed the plan on September 20, 2001.

[4] U.S. Bankruptcy Court District of Delaware Docket Report entry 338582358 on September 18, 2001 states – "*Notice of Appeal. Receipt Number 055161, Fee Amount $105. Filed by James J. Hayes.*"

[5] U.S. Bankruptcy Court District of Delaware Docket Report Docket Report entry 338582359 on September 24, 2001 states – "*Amended Notice of Appeal. Receipt Number 055161, Fee Amount $105. Filed by James J. Hayes.*"

appealing "*...the exact same bankruptcy judgment...*" as the so called September 20, 2001 notice of appeal, the foundation of case 01-0718. (App. A4) Clearly, the Third Circuit's analysis is premised on a bogus appeal created by Genesis. [6]

The Third Circuit opinion concluded: "*Hayes did not argue any other circumstances, and we find none on this record, warranting reopening the appeal.*" (App. A4) However, the District Court opinion noted: "[t]*he Appellant contends...it would violate his due process rights to dismiss this case based upon the Court's conclusions in a 'spurious' case.*" (App. A6) Had the Third Circuit analyzed this constitutional issue it could have seen that the spurious appeal was so designated because it was not filed by the petitioner, that it appealed a non-existent order, and raised no issues. The dismissal of the spurious appeal has no possible bearing on the petitioner's appeal and the decisions to the contrary can only be considered a new violation of shareholders due process rights.

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[6] The District Court characterized the problem as a mistake by the Clerk of the Court in double docketing this case in C.A. Nos. 01-718 JJF and 02-016 JJF. (App. A-6) The district court clerk can hardly be faulted for separately docketing notices of appeal filed nine weeks apart. The real question is why the bankruptcy court clerk would delay sending the district court a notice of appeal by nine weeks. The delay is inexplicable without considering that on the same day that the District Court docketed this appeal it docketed Genesis' designations of the record for the appeal. This shows that Genesis knew the bankruptcy court clerk would make a late filing and just coincidently designated the record for the supposed petitioner's appeal at the same time. More likely, the spurious appeal is bogus and was created by Genesis.

## REASONS FOR GRANTING WRIT

### A. The Third Circuit Decision To Ignore Constitutional Issues Conflicts With Other Circuits

Not surprisingly every circuit court of appeal has considered a broad spectrum of constitutional issues raised in bankruptcy appeals. The circuits have uniformly held that due process requirements apply to bankruptcy proceedings. *In re Barton Industries*, 104 F. 3d 1241 (10th Cir. 1997), *In re Cabral*, 285 B.R. 563 (1st Cir. BAP)

The due process issues have ranged from the serious where a confirmed bankruptcy plan was subordinated to constitutional due process to the bizarre. *In re Kendavis Holdings Co.*, 249 F. 3rd 383 (5th Cir. 2001) the court determined that due process precluded discharge of retiree creditor's unlisted post petition claim for additional pension benefits against employer/chapter 11 debtor:

> Protection of an individual's due process right to adequate notice requires more than a cursory review...
>
> . . .
>
> Under the Supreme Court's standard, we must analyze the particular facts of each case. Id. 386

*In Re Kmart Corp.* 359 F. 3d 866 (7th Cir. 2004), judge Easterbrook permitted Handleman, a non party, to intervene in a Seventh Circuit appeal to argue a bizarre due process claim. Handlemen, a Kmart creditor, benefited as a designated critical vendor from a bankruptcy court order allowing Kmart to immediately pay critical vendors. The district court reversed the bankruptcy court and Kmart appealed to the Seventh Circuit. Handleman argued that it was not a "party" in the district court and, consistent with the

due process clause of the fifth amendment, could not be bound by the district court's decision. Considering this novel due process claim, Judge Easterbrook reasoned:

> [i]f the lack of personal notice about the proceedings before the district judge deprived Handleman of due process, then Kmart's application to the bankruptcy judge deprived about 47,000 unsecured creditors of the process! That would render the critical vendors order void, and Handleman would be worse off... But there is no constitutional obligation to make every creditor a party to every contested matter in the bankruptcy.... Kmart vigorously represented the interests of Handleman and the other vendors Kmart deemed "critical." Id. 870.

The Seventh Circuit recognized that federal courts have an obligation to consider constitutional issues whether serious or silly. An element of this consideration is the written opinion with analysis that explains why the particular action does or does not violate the constitution. The Third Circuit opinion ignored the constitutional issues and in doing so conflicts with every circuit court of appeal that has considered constitutional issues in bankruptcy appeals.

In a broader spectrum of cases, circuit courts have consistently recognized their duty to consider constitutional issues in cases under their jurisdiction. In *Stumpf v. Mitchell*, 367 F. 3d. 594 (6th Cir. 2004), the court reviewed a death penalty murder conviction for new Fifth Amendment and due process violations 20 years after the fact, even after this Court, previously rejected an earlier cert. petition. The Sixth Circuit concluded:

> ...that Stumpf's due process rights were violated

by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories. Id. 596.

This case shows that federal courts' obligation to consider constitutional issues is a continuing one in light of new facts and/or new legal precedent. Although this Court granted a writ to review, it certainly won't admonish the Sixth Circuit for considering and deciding the constitutional issues.

In *Padilla v. Rumsfeld*, 353 F. 3rd 695 (2nd Cir. 2003), the Second Circuit cited *Marbury v. Madison* in a recent affirmation of the responsibility of the federal courts to decide constitutional issues.

> Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts. Id. 713 citing *Marbury v. Madison,* 5 U.S. (1Cr.) 137 (1803).
>
> . . .
>
> Based on the text of the Constitution and the cases interpreting it, we reject the government's contention… Id. 718

And this Court's review while reversing the Second Circuit's judgment required that the order of dismissal be without prejudice allowing these constitutional claims to be filed in the proper jurisdiction. *Rumsfeld v. Padilla* 541 U.S. 984. This case is a fitting affirmation of Chief Judge Marshall's admonition: "*In some cases then, the constitution must be looked into by the judges*." *Marbury* at 178. The Third Circuit stands alone in thinking that it can avoid looking at the Constitution by simply ignoring the constitutional issues raised in appeals under its jurisdiction.

## B. Bankruptcy Rules Create Opportunities For Post Bankruptcy Investors To Profit At The Expense Of Pre-Bankruptcy Investors

Application of federal bankruptcy laws have a profound effect on the trading of distressed securities preceding and following the actual filing of a bankruptcy petition. The prices of these securities fall dramatically on the announcement or rumor of a bankruptcy filing as investors panic and sell rather than remain invested in a bankrupt company. Many institutional investors' charters require a sale when bond ratings drop below investment grade. Forced or panic selling overlooks or ignores the company's true worth. Attracted to bargains, investment professionals, who specialize in researching distressed securities scoop up these bonds or claims at discounted prices.

Because of the new informational and analytical requirements, bankruptcy investing is an arcane specialty dominated by hedge funds and others with large pools of capital. Bankruptcy investors utilize specialized knowledge to identify the particular securities favored by the bankruptcy rules and then acquire large or dominant positions in order to influence decision-making through appointment to the creditors committee.[7] Bankruptcy investors then use their dominance and expertise to get their legal and financial advisors selected as the creditors committee's legal and financial advisors. The bankruptcy investor now controls the process of negotiating the reorganization plan. Because of long-standing relationships, the bankruptcy investor's advisors have proven their proficiency in carefully shading the financial analyses provided as expert testimony to the bankruptcy court that justifies the favorable allocations for

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[7] Bankruptcy rules provide that the largest creditors serve on the creditor committees.

the bankruptcy investor in the restructured enterprise.

The bankruptcy investor's financial and legal advisors also use their expertise and early preparation to preemptively foreclose the appointment of an equity committee that could counter balance the analyses of the creditors committee. Under bankruptcy rules, an equity committee is appointed at the discretion of the United States Trustee or on petition to the bankruptcy court. In both cases, timely legal argument and financial analyses by the creditor's committee is particularly helpful in "killing this baby in the cradle."

Historically, equity securities have been unfairly disfavored in bankruptcy proceedings, no doubt due to the effective representation of the creditor committee. There are rarely post bankruptcy concentrations of equity holdings that could act as a countervailing power. The major equity holders have sold out in anticipation that the equity would receive little or no participation in the reorganized enterprise. Without the resources provided by concentrated holdings, shareholders are simply not prepared to make the timely and well researched arguments needed to achieve appointment of an equity committee. Foreclosing an equity committee makes it easy for the bankruptcy investor to foreclose distributions to shareholders which necessarily enhances its windfall gains.

This gaming of the bankruptcy process has preceded to such a fine art that *The Turnaround Letter*, a long time and well regarded shareholder newsletter, advises its clients:

> [t]he first rule of bankruptcy investing is to avoid the common stock of a company in Chapter 11, no matter how "cheap" it may seem. There is a tremendous temptation to say "Iridium's stock was trading at 50 a year ago, and so it must be cheap at 1

or 2" or "At 1 or 2 how much lower can it go" Our responses to these statements are "Wrong!" and "To zero", respectively.

*The Turnaround Letter,* p. 1 Vol. 14 n. 3, Sept. 1999.

There are significant macro economic problems caused by the wealth transfer from shareholders to debt holders in successful bankruptcy reorganizations. The creation of windfall gains for debt holders by taking corporate ownership from shareholders without compensation lies at the heart of the problem. The denial of an equity committee facilitates these windfall gains while obscuring their reality. The enormity of the windfall gains seen retrospectively in the examples of Genesis and Kmart, discussed below, shows the reality of the problem.

### C. Genesis And Kmart Are Examples Showing That The Denial Of Shareholders' Constitutional Rights To Compensation And Due Process Facilitates Enormous Gains For Bankruptcy Investors

The Bankruptcy Court accepted $1.75 billion as the enterprise value of the reorganized Genesis based on comparable company analyses by the debtors' investment bankers. The Bankruptcy Court concluded that $1.75 billion was not sufficient for the senior lenders to recover 100% of their claims. *In Re Genesis Health Ventures, Inc., et al.*, 266 B.R. 591 616 (Bankr. D. Del.) However, on December 31, 2004, Genesis enterprise value was about $2.5 billion. The question arises as to how much of this $750 million difference is due to undervaluation reflecting the investment bankers' bias or more likely the fraud alleged by Genesis's junior bondholders. Undervaluation creates windfall gains for the senior lenders at the expense of distributions for the junior bondholders and shareholders. The petitioner's review

of the valuations shows that about $550 million reflects undervaluation in the bankruptcy valuations and thus represents a windfall gain for the senior lenders.[8]

In addition to the huge windfall gains, the bankruptcy investors garnered a huge investment gain. Three months prior to the bankruptcy filing, Genesis bank loans were trading at 48% of their face value. Eighteen months later, the Bankruptcy Court valued the distributions exchanged for these loans at 88%.[9] Id. 616. The bankruptcy investor's huge gains came at the expense of junior bondholders who incurred losses on their investment and shareholders who lost their entire investment when their stock was cancelled by the reorganization plan. The enormous profit available to favored bankruptcy investors underlies the corruption of the bankruptcy process. Providing shareholders their constitutional rights to just compensation and due process through the appointment of an equity committee is a partial solution to a complex and widespread problem.

The Genesis bankruptcy is not an isolated example of bankruptcy investors gaming the bankruptcy rules to obtain

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[8] The investment banking valuations depended on the market price multiples of two comparable companies, Beverly Enterprises and Omnicare, which were picked by the investment bankers as companies best representing Genesis long-term care and institutional pharmacy businesses. At December 31, 2004, the market price of Beverly stock had declined by 14.5% while Omnicare's stock had increased by 47%. These changes would increase Genesis's enterprise value by about $200 million, reflecting improved market valuation since the reorganization.

[9] Excluding adequate protection payments and administrative costs increases the senior lender recovery to 101 per cent. These balance sheet items as well as the cash on Genesis and Multicare's balance sheet must be subtracted from the claims to determine the hypothetical enterprise value required for a 100 % senior lender recovery. These errors are the principal focus of the petitioner's appeal.

huge profits at the expense of less favored classes. On January 12, 2002, Kmart unexpectedly filed for bankruptcy protection after a disastrous Christmas season. Two months prior to filing, Kmart's enterprise value was about $8 billion with $3.75 billion equity. Three weeks after filing, Kmart's enterprise value dropped to about $2.9 billion with $.89 billion equity. Kmart's debt dropped from $1.85 billion to $.95 billion. Bank loans dropped by a similar amount.

The drastic decline in bond prices attracted bankruptcy investors led by Eddie Lampert and his hedge fund ESL Investments who purchased hundreds of millions of Kmart debt and bank loans. Investors avoided Kmart's equity. Under bankruptcy protection, Kmart restructured its retailing empire by closing 600 of its 2,100 stores. The bankruptcy investors used their dominant position in favored debt issues to control the financial restructuring. Sixteen months after filing, Kmart's reorganization plan was approved by the bankruptcy court. The equity in the reorganized Kmart was distributed to the debt holders. Kmart's equity holders received nothing.

Thanks to the relief provided by the bankruptcy rules, the reorganization of Kmart's retail empire was a huge success. By October 2004, the enterprise value of the new Kmart was about $7.2 billion, only about $800 million less than the enterprise value of the old Kmart two months prior to its bankruptcy filing. And the new Kmart had an impeccable balance sheet with $1.6 billion in net cash. This achievement is even more remarkable considering that Kmart recognized more than $2.1 billion in losses in the year preceding its bankruptcy filing.

The success in saving the enterprise stands in marked contrast to the failure of the bankruptcy process to protect former shareholders, and debt holders who sold in the panic

following the bankruptcy filing. Kmart's equity holders suffered a catastrophic loss of $3.75 billion based on Kmart's stock value two months prior to its bankruptcy filing. Panicky debt holders lost about half the value of their investment. Bankruptcy investor Eddie Lampert and ESL Holdings recorded a gain of $3.4 billion on their post bankruptcy acquisition of Kmart bonds and debt. Assuming that Lambert's hedge fund purchased this debt at a 58% discount, this gain is divided into a $2.2 billion windfall resulting from undervaluation of Kmart in bankruptcy and a $1.2 billion investment gain from the panic selling following the bankruptcy filing.

The Genesis and Kmart outcomes are contrary to Congressional intent of writing bankruptcy laws to protect investors and creditors who had the misfortune of supplying capital, goods, or labor to a failing enterprise. Federal courts have a duty to see that the intent of Congress is fulfilled. But, complex bankruptcies with dominant bankruptcy investors present courts inexperienced in investment banking analysis with real challenges. Federal courts, however, have a more fundamental duty to protect and defend the Constitution. Bankruptcy reorganization plans which deny shareholders equity committees and/or deny shareholders an allocation in a successful restructuring are prima facie violations of the Fifth Amendment that can't be ignored by federal courts.

### D. Seitel Example Shows That Appointment Of Equity Committee Benefited Shareholders And Bondholders

The wisdom of providing Fifth Amendment due process is illustrated by the Seitel bankruptcy. Seitel is oil and gas exploration service company that leases seismic data from one of the largest seismic data libraries in North America.

The firm also participated in joint venture exploration with its data clients. After gross mismanaged and self dealing, debt holders forced the company into bankruptcy. Following the bankruptcy announcement, bankruptcy investors, in a rare move, acquired a dominant equity position and requested the appointment of an equity committee. The U.S. Trustee appointed an official equity committee shortly after the company filed its bankruptcy petition and significantly a week before the bankruptcy court authorized the debtor to retain legal and financial advisors.

The debtor proposed a reorganization plan that offered unsecured note holders about 71% of the face amount of the notes and equity holders $0.40 per share. The equity committee, with the assistance of its legal and financial advisors, advised shareholders vote against the debtor's plan. The committee informed shareholders that the payment to shareholders was inadequate and that it had prepared a superior alternative plan, which it would propose if the debtors' plan was defeated.

The debtors' plan was defeated, and the equity committee proposed a plan that allowed shareholders to retain all their equity and cashed out the unsecured note holders at 100% of face value. This plan was approved by the note holders and shareholders and was confirmed by bankruptcy court. Following confirmation, Seitel's common stock traded in excess of $4.50 per share before a warrant offering c ompleted the financing of the plan. (*In Re Seitel et. al.*, U.S.B.C. D.Delaware, No. 03-12227 PJW (2004))

The Seitel example shows that appointment of an equity committee in bankruptcy reorganizations furthers the intent of Congress in saving bankrupt firms from liquidation by reorganization and at the same time providing equitable distributions and allocations to the firm's pre-bankruptcy

creditors, bondholders and shareholders. The appointment of an equity committee early in the Seitel bankruptcy led to an alternative reorganization plan that improved the recovery of bondholders and shareholders over the plan produced by the debtor.

### E. Recognition of Shareholders Constitutional Rights In Complex Bankruptcies Will Increase National Wealth

The widespread perception that equity investors will incur a total loss if their company files for bankruptcy protection impairs the efficiency of the market in valuing equities. As a consequence, equity investors will be overly cautious and reduce their bids for hundreds or thousands of companies with suspect balance sheets and/or high levels of debt. This rational behavior reduces market values and national wealth. Some companies will lose the ability to obtain new equity financing which would increase the number of bankruptcy filings, perpetuating the viscous cycle.

The Genesis and Kmart bankruptcies show how billions of dollars of shareholder wealth has been unfairly transferred to debt holders by bankruptcy investors gaming the bankruptcy process. Nor are these examples unique as shown by increasing number of hedge funds that have figured out how to game the bankruptcy process to provide huge windfall profits for themselves at the expense of shareholder losses. Correcting this problem, would let equity investors value companies on their economic merits irrespective of weak balance sheets and/or high levels of debt. In time, this would lead to increased stock market valuations and increased national wealth.

By affirming that shareholders in bankruptcy have constitutional rights to just compensation and due process,

e.g. the early appointment of equity committees in complex bankruptcies, this Court can transform the current viscous cycle into a virtuous cycle. Investors will gain confidence to bid what they determine a company is worth regardless of the strength of the balance sheet. Bids for stock in companies with suspect balance sheets would increase, more new equity financing will be available to these companies resulting in fewer bankruptcies and increased national wealth.

## CONCLUSION

For over 200 years this Court has required federal courts to decide the constitutional issues in cases arising under its jurisdiction.

> The judicial power of the United States is extended to all courts arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained.

*Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177-178 (1803)

In this case, both the District Court and the Third Circuit overlooked constitutional issues in dismissing a bankruptcy appeal that would have challenged the cancellation of shareholders stock as a taking that violated shareholders Fifth Amendment rights to due process and compensation.

Takings and Due Process considerations are not restricted to the Genesis bankruptcy. Most significant bankruptcy

filings attract specialized investors typically hedge funds who acquire dominant positions in creditor claims accorded preferential treatment by bankruptcy law. These bankruptcy investors use their influence to deny appointment of an equity committee for shareholders and provide biased valuations that result in large windfall gains for the bankruptcy investor at the expense of shareholders.

In the macro sense, the unfair treatment of shareholders in bankruptcy reduces national wealth as investors reduce prices they to pay for all companies with lower quality balance sheets. This in turn will cause more bankruptcy filings and more damage to the national economy.

For the foregoing reasons, this Court is required to remand this case to the Third Circuit for consideration of the constitutional and equitable mootness issues.

April 20, 2005

Respectively Submitted,

James J. Hayes
Petitioner

# APPENDIX

**UNREPORTED- NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 04-1862

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IN RE: GENESIS HEALTH VENTURES, INC., et al.;
MULTICARE AMC, INC., et al.,
Debtors

JAMES J. HAYES,
Appellant

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On Appeal From the United States District Court
For the District of Delaware
(D.C.Civ.No.01-cv-00718)
District Judge: Honorable Joseph J. Farnan, Jr.

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Submitted Under Third Circuit LAR 34.1 (a)
December 3, 2004

Before: NYGAARD, VAN ANTWERPEN and COWEN,
Circuit Judges

(Filed December 6, 2004)

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OPINION

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PER CURIAM

James J. Hayes, a former shareholder of Appellee/ reorganized debtor Genesis Health Ventures, Inc. (with its affiliated co-debtors and Appellees, hereafter referred to collectively as ("Genesis"), appeals from the order of the United States District Court for the District of Delaware issued February 26, 2004, denying his motion to reopen his appeal of the Bankruptcy Court's confirmation of the reorganization plan for Genesis that was dismissed by order of the District Court entered March 12, 2003.

On September 13,2001, the Bankruptcy Court entered judgment confirming the plan of reorganization in the jointly administered cases of In re: Genesis Health Ventures. Inc. et al, Bankruptcy Case No. 00-2692, and In re: Multicare AMC. Inc., Bankruptcy Case No. 00-2494. Hayes filed two notices of appeal from this judgment on September 13, 2001 and September 20, 2001. The procedural history of what should have been one appeal in the District Court was unfortunately and inadvertently complicated by the fact that Hayes's notices of appeal were docketed as two separate appeals. Civ. A. No. 01-00718 (docketed in October 2001) and Civ. A. No.02-00016 (docketed in January 2002). These appeals proceeded on parallel courses until September 20, 2002, when the District Court granted Appellees' unopposed motion to dismiss the appeal in 02-00016 on grounds of equitable mootness. Hayes did not appeal the dismissal order in 02-00016.

Shortly after 02-00016 was closed, the District Court issued a briefing schedule in 01-00718, which triggered correspondence from the Appellees to the District Court advising the District Court of the double docketing error and requesting that the appeal in 01-00718 be dismissed for the same reasons set forth in the District Court's September 20,

2002 order in 02-00016. Hayes responded by letter to the District Court in which he claimed that equitable mootness did not apply for reasons set forth in his brief filed in 01-00718. On March 12, 2003, the District Court dismissed the appeal in 01-00718 because the matter "was fully briefed and was decided under Civil Action No. 02-016 JJF." The District Court also directed any party who disagreed with the dismissal of the action to file a motion to reopen within twenty days of the order. Hayes filed a motion to reopen the appeal on April 2, 2003, claiming that applying the judgment in 02-00016 would violate his due process rights and would be inappropriate because Hayes had not filed any pleadings in 02-00016. The District Court denied the motion to reopen on February 26, 2004, concluding that the dismissal of the appeal in 02-00016 for equitable mootness controlled the decision in 01-00718 and thus Hayes was foreclosed from relitigating the appeal. The District Court found in particular that Hayes did not contend that he had not received notice of Appellees' motion to dismiss in 02-00016, nor did he offer any explanation why he did not file a brief in opposition to the dismissal motion in that case. Hayes filed a timely notice of appeal.[1]

We have appellate jurisdiction pursuant to 28 U.S.C. §§ 158(d) and 1291. We note that most of Hayes's arguments on appeal concern the application of the doctrine of equitable mootness in his case, in effect challenging the District Court's dismissal of the action in 02-0016 and the District Court's March 12, 2003, order dismissing the appeal in 01-0718 as previously litigated. However, Hayes did not appeal the order in 02-00016 dismissing the action as

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[1] The notice of appeal erroneously refers to the date of the order as February 26, 2003, instead of 2004.

[2] Because the motion to reopen was filed more than ten days after the entry of the March 13, 2003 order, it did not toll the time for appeal from that order. See Fed. R. App. P. 4(a)(4)(A)(vi).

equitably moot, or the District Court's March 12, 2003, order.[2] Absent a timely appeal of these orders, we lack jurisdiction to review them and, therefore, we will not address Hayes's equitable mootness arguments and other related arguments. Our review is limited to the sole order properly before us, the District Court's order entered February 27, 2004, denying Hayes's motion to reopen. We review the District Court's decision on a motion to reopen for abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S.321, 332 (1971); United States v. Coward. 296 F.3d 176, 180 (3d Cir. 2002). We will affirm.

We discern no abuse of discretion in the District Court's refusal to revisit its order dismissing the appeal in 01-0718 as previously litigated in 02-00016. There is no question that 01-0718 and 02-00016 involve the exact same appeal from the exact same bankruptcy judgment confirming the exact same reorganization plan and that but for a clerical error, Hayes's appeal notices would have been docketed as one appeal at the onset. As the District Court correctly pointed out, Hayes had notice of Appellee's motion to dismiss in 02-00016, and he had about eight months within which to file a brief in opposition to the dismissal motion, but did not. Hayes argued in his motion to reopen that the Appellees showed bad faith in failing to notify the District Court of the double-docketing problem. The truth of the matter is that both sides should have been alerted to the double-docketing problem when they received the second docketing notice in early January 2002. Yet neither Hayes nor Genesis advised the District Court of the error until shortly after the District Court dismissed the appeal in 02-00016 as equitably moot. Hayes did not argue any other circumstances, and we find none on this record, warranting reopening the appeal. Thus, the District Court properly exercised its discretion in denying the motion to reopen.

Accordingly, the judgment of the District Court entered February 27, 2004, will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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|---|---|
| IN RE:Chapter 11<br>GENESIS HEALTH<br>VENTURES, INC., et al.<br>Debtors. | Bankruptcy Case No. 00-2692<br>JHW (Jointly Administered) |
| IN RE: Chapter 11<br>MULTICARE AMC, INC., et al.,<br>Debtors. | Bankruptcy Case No. 00-2494<br>JHW (Jointly Administered) |
| JAMES J. HAYES,<br>Appellant,<br>v.<br>GENESIS HEALTH<br>VENTURES, INC., et al.,<br>Appellees. | **CONSOLIDATED**<br>Civil Action No. 01-718 JJF |

**MEMORANDUM ORDER**

By his Motion (D.I. 18), the Appellant asks the Court to reopen Civil Action Number ("C.A. No.") 01-718 JJF. For the reasons discussed, the Court will deny the Motion.

## I. Background

This is an appeal of the Bankruptcy Court's September 20, 2001, opinion on confirmation. By mistake, the Clerk of the Court double docketed this case in C.A. Nos. 01-718 JJF

and 02-016 JJF. On September 30, 2002, the Court granted Appellees' unopposed motion to dismiss the appeal in C.A. No. 02-016 JJF as equitably moot. (D.I. 10 in C.A. No. 02-016 JJF).

On December 4, 2002, the-Appellees submitted a letter to the Court stating that C.A. No. 02-016 JJF was the same appeal as the instant case, and therefore, contended that the Court should apply its Memorandum Order dismissing C.A. No. 02-016 JJF to this case. On March 12, 2003, the Court entered an Order dismissing the instant case because the appeal was fully briefed and decided under C.A. No. 02-016 JJF. (D.I. 17 in C.A. No. 01-178 JJF.) This is the Appellant's Motion to Reopen the Court's dismissal and closure of C.A. No. 01-718 JJF.

**II. Appellant's Contentions**

The Appellant contends that the Court should reopen the instant case because it would violate his due process rights to dismiss this case based upon the Court's conclusions in a "spurious" case. The Appellant also contends that applying the judgment in C.A. No. 02-016 JJF to this case would be inappropriate because, at the time of entry of the Court's Memorandum Order in C.A. No. 02-016 JJF, he had not "made any filings in this case[.]" (D.I. 19 at 6.)

**Ill. Decision**

The Court granted the Appellees' motion to dismiss in C.A. No. 02-016 JJF on the grounds that the appeal was equitably moot. The Appellant does not contend that he did not receive notice of the Appellees' motion to dismiss in C.A. No. 02-016 JJF. However, he did not file an opposition brief and has offered no explanation. Because the Appellant is the appellant in both C.A. No. 02-016 JJF and C.A. No. 01-718

JJF, the Court concludes that the dismissal in C.A. No. 02-016 JJF controls the decision here. The Appellant cannot litigate issues in this case that he should have litigated in C.A. No. 02-016 JJF merely because of a clerical error.

NOW THEREFORE, IT IS HEREBY ORDERED that the the Appellant's Motion to Reopen (D.I. 18) is **DENIED.**

February 26, 2004
DATE

/s/ Joseph J. Farnun, Jr.
United States District Court

UNITED STATES CORT OF APPEALS
FOR THE THIRD CIRCUIT

N0.04-1862

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IN RE: GENESIS HEALTH VENTURES, INC., et al.;
MULTICARE AMC, INC., et al.,
Debtors

JAMES J. HAYES,
Appellant

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On Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. No. Ol-cv-00718)
District Judge: Honorable Joseph J. Farnan, Jr.

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Submitted Under Third Circuit LAR 34.1 (a)
December 3, 2004

Before: NYGAARD, VAN ANTWERPEN and COWEN,
Circuit Judges

**JUDGMENT**

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This cause came on to be heard on the record from the United States District Court for the District of Delaware and was submitted pursuant to Third Circuit LAR 34.1 (a). On

consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment of the district court entered February 27, 2004, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

DATED: December 6, 2004

ATTEST:
/s/Marcia M. Waldron
Clerk

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-1862

IN RE: GENESIS HEALTH VENTURES, INC., et al.;
MULTICARE AMC, INC., et. al.,
Debtors

JAMES J. HAYES,
Appellant

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On Appeal from the United States District Court for the
District of Delaware
(Dist. Ct. No. Ol-cv-00718)

SUR PETITION FOR REHEARING

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BEFORE: SCIRICA, Chief Judge.
NYGAARD, ALITO, MCKEE, AMBRO, FUENTES,
SMITH, CHERTOFF, VAN ANTWERPEN and COWEN,
Circuit Judges[1]

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The Petition for rehearing filed by the Appellant in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for

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[1]Judge Cowen's vote is limited to panel rehearing only.

rehearing, and a majority of the circuit judges in regular
In re: Genesis Health Ventures, Inc.
No. 04-1862
Page 2

active service not having voted for rehearing by this court en bane, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

DATE: January 25, 2005

/s/ Richard L. Nygaard
United States Circuit Judge

LML/cc: Mr. James J. Hayes
Russell C. Silberglied, Esq.
Adam P. Stochak, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | : | Chapter 11 |
| | : | |
| GENESIS HEALTH | : | Case No. 00-2692 (JHW) |
| VENTURES, INC., et al., | : | (Jointly Administered) |
| Debtors, | : | |
| | : | |
| | : | |
| | : | |
| JAMES J. HAYES | : | |
| Appellant, | : | |
| | : | |
| v. | Civil Action No 01-718-JJF | |
| | : | |
| GENESIS HEALTH | : | |
| VENTURES, INC., et al., | : | |
| Appellees. | | |

**MEMORANDUM ORDER**

Now pending before the Court is Appellant's Motion for Appointment of Official Committee of Equity Security Holders for the Purpose of Appealing Confirmation of the Genesis Reorganization Plan and Delay of Appellant's Brief Pending the Appointment of Counsel (D.I. 7). For the reasons set out below, the Appellant's Motion (D.I. 7) will be denied.

The Appellant provides no legal support for his contention that this Court is empowered to appoint an Equity Committee for the purpose of appealing a Bankruptcy Court's confirmation order. The U.S. Trustee is the only party

able to appoint an Equity Committee. Here, the U.S. Trustee did not do so, and the Bankruptcy Court upheld that decision. The Appellant failed to appeal that decision to the district court. Consequently, the Appellant cannot now petition the district court to appoint an Equity Commission.

NOW THEREFORE, IT IS HEREBY ORDERED this 30 day of September, 2002, that Appellant's Motion for Appointment of Official Committee of Equity Security Holders for the Purpose of Appealing Confirmation of the Genesis Reorganization Plan and Delay of Appellant's Brief Pending the Appointment of Counsel (D.I. 7) is **DENIED.**

/s/ Joseph J. Farnan, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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|---|---|
| IN RE: | : Bank. No. 00-2692 |
| GENESIS HEALTH VENTURES, INC. | : |
| Debtor | : |
| JAMES J. HAYES, | : |
| Appellant | : Civil Action. No. 01-718 JJF |
| v. | : |
| GENESIS HEALTH VENTURES, INC., Appellee | : |

**ORDER**

WHEREAS, Appellant James J. Hayes filed an appeal of the Bankruptcy Order on October 31,2001;

WHEREAS, Appellant's Brief was due on January 18, 2002;

WHEREAS, no such brief has been filed as of November 4, 2002 and no briefing schedule has been filed;

NOW THEREFORE, IT IS HEREBY ORDERED that the parties shall adhere to the following briefing schedule :

1.) Appellant's Opening Brief shall be filed on or before **Friday, November** 22, 2002;

2) Appellee's Answering Brief shall be filed on or before **Friday, December 20, 2002,** and;

3) Appellant's Reply Brief shall be filed on or before **Friday, January 17, 2003.**

11/6/02
DATE

/s/ Joseph J. Farnan, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | : | Bank. No. 00-2692 |
| GENESIS HEALTH | : | |
| VENTURES, INC., | : | |
| Debtor | : | |
| | : | |
| JAMES J. HAYES, | : | |
| | : | |
| Appellant | : | Civil Action. No. 01-718 JJF |
| | : | |
| v. | : | |
| | : | |
| GENESIS HEALTH | : | |
| VENTURES, INC., | : | |
| Appellee | | |

**ORDER**

WHEREAS, the above-captioned matter was fully briefed and was decided under Civil Action No. 02-016 JJF;

NOW THEREFORE, IT IS HEREBY ORDERED that:

1) This case is **DISMISSED.**

2) If any party disagrees with the dismissal of this action, they shall file a motion to reopen within (20) twenty days of the date of this Order.

3/12/03
DATE

/s/ Joseph J. Farnan, Jr.
United States District Judge